



EMPLOYMENT TRIBUNALS

Claimant: Miss Wendy Lancaster

Respondents: 1. Fidessa PLC
2. Mr D Tumber

HELD AT: Watford

ON: 4 August 2017

BEFORE: Employment Judge Tom Ryan
Mrs G Bhatt MBE
Mr S Bury

REPRESENTATION:

Claimant: No attendance

Respondents: No attendance

JUDGMENT

The judgment of the Tribunal is that the comment of the second respondent made by him to Ms P Nosal (the first claimant in these proceedings) and reported by her to the second claimant were perceived by her as having the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for her, and, in that sense, was a detriment.

REASONS

1. This hearing was convened at the order of Her Honour Judge Eady QC in the Employment Tribunal in appeal UKEAT/0093/16/LA given on 19 January 2017.
2. At the hearing of that appeal the Employment Appeal Tribunal had upheld the appeal of the respondent employer in part on the claims of direct sex discrimination and harassment of Miss Lancaster, and remitted part of those claims for reconsideration, in the light of the Employment Appeal Tribunal's judgment, on the questions effect and detriment for the purposes of section 26(1) of the Equality Act 2010.
3. The parties have been offered the opportunity to make further representations or attend this hearing and have declined to do so, accepting that the Tribunal can conduct the reconsideration and address the matters remitted by the Employment

Appeal Tribunal by reference to the material previously put before it without the need for further evidence, submissions or representations.

4. The specific point that we were required to reconsider is identified in paragraphs 32-35 of the judgment of the Employment Appeal Tribunal.
5. In our original judgment in this case we had upheld the claimant's allegation that the respondents had directly discriminated against Miss Lancaster and had subjected her to harassment in relation to the protected characteristic of sex in that the second respondent had, upon learning of her second pregnancy, said to Ms Nosal, "Oh fuck, she's pregnant". It was common ground that this was not something that he had said directly to Miss Lancaster but at a later point in time during a redundancy process Ms Nosal had reported it to Miss Lancaster.
6. The appeal was upheld on the basis that we had made no findings as to the impact that remark then had on the claimant. Such findings were held to be necessary for the tribunal to make findings as to whether that treatment had the necessary effect for a conclusion of harassment and amounted to a detriment.
7. As was held by the Employment Appeal Tribunal we did not make express findings as to what the claimant's actual response was when she was told of the remark, nor did we address the claimant's evidence of shock on being told of the comment by Ms Nosal.
8. Specifically at paragraph 35 of her judgment Her Honour Judge Eady QC said this:

"It would certainly not be perverse of an ET to conclude that learning of such a comment having been made in those circumstances amounted to a detriment for an employee and give rise for the requisite effect for the purpose of section 26, but, absent any specific finding as to the impact on the claimant herself, can I say that the ET was bound to reach that conclusion? I am persuaded by Mr Palmer that if I adopted that approach then I too would fall into the trap of making an assumption as to how a particular incident would impact upon an employee. Whilst I might think it unlikely that learning of such a remark would *not* amount to a detriment for an employee in the Claimant's position and/or would *not* give rise to the effect required under section 26(1), I do not think I can simply presume that to be the case. That is, however, what the ET's absence of finding would require me to do. I have therefore concluded (albeit with some reluctance) that I have to allow the appeal on these grounds in respect of the direct sex discrimination and harassment claims."

9. Those conclusions led the Employment Appeal Tribunal to remit this matter to the same Tribunal for reconsideration of its conclusions on direct sex discrimination and harassment. HH Judge Eady QC described the deficiency which she had found to relate to an absence of reasoning on a specific point, that is the claimant's reaction to learning of Mr Tumber's reaction to news of her pregnancy in July 2014.
10. Those then are the parameters for our reconsideration.

11. In conducting that reconsideration we have had regard to the witness statements, the bundles of documents which, helpfully, the parties were able to supply to the Tribunal again in the intervening period, to our notes of evidence, and we have made reference as well to the claimant's second witness statement provided at the subsequent remedy hearing and to our notes in relation to that hearing as well.
12. The starting point for our reconsideration then is Miss Lancaster's first witness statement.
13. The claimant described her reaction to Mr Tumber's behaviour generally in paragraphs 95-99 of her first witness statement. She describes his behaviour to her as "extremely rude and deeply upsetting". She said that she felt "ignored and excluded" by him and she felt that he did not value her work and that he had a low opinion of her. This, she stated, was reinforced by his comments set out in the witness statement where he had referred to her as "dumb" on more than one occasion. She described him as having little sympathy for her as a working mother and she said that she was adamant that his treatment towards her deteriorated after he discovered that she was pregnant and the inevitable fact that she would be taking maternity leave. She described him as having even less time for her and that he became even more dismissive of her. He had spoken to her at a meeting on 15 August 2015 in a way that was rude and disrespectful. She had reported to the respondent how after Mr Tumber discovered she was pregnant he was "even more picky" with her and all her mistakes were noted and that he told Ms Nosal to tell her off. His behaviour and the critical comments towards her during her pregnancy caused her significant distress at what she said should have been a happy period of her life:

"I spent most of the time feeling like I was treading on eggshells and I dreaded seeing Mr Tumber. The redundancy situation and Mr Tumber's attitude towards me whilst I was pregnant damaged my self esteem."

14. Specifically with regard to the comment with which we are now concerned she said:

"When I discovered Mr Tumber's outburst about my pregnancy I was shocked. He did not say congratulations as I expected. I could not understand how someone could say something like that."

15. In this context Miss Lancaster made reference to statements made by her at a grievance/appeal meeting that took place on 10 December 2014. She referred to the comment made by Mr Tumber to Ms Nosal and said that Ms Nosal was shocked to hear it and went on to say immediately:

"He is picky. The last few months all mistakes I make are noted. He tells Patricia (Ms Nosal) to tell me off. There was no congratulations, that's something not really expected. How could someone say something like that?"

16. Miss Lancaster went on to expand upon the criticisms that she felt Mr Tumber made of her. He told Ms Nosal that she made "stupid mistakes". She said that he avoided talking directly to her. She said that if she asked him something he would

say “come back” but never answered the phone, and then the following exchange took place. She was questioned by Paula Feargrieve, the Global Head of Service Delivery, and Gill Powell, the HR Manager:

PF: He’s picky just to you?

WL: Yes, just to me.

JP: This has only happened since the pregnancy?

WL: Yes, only in the last couple of months. He asked Patricia everything I do and then he nails me. You could say I took it wrong but it happens a lot.

17. Ms Powell went on to ask if the claimant could give examples and asked whether what Mr Tumber had said “couldn’t have been clarifying”. Miss Lancaster answered:

“It’s not how I felt. He’s been picking. It’s a information [sic] I could provide. It’s not happened before. Only now it’s happened. It’s just picking on one person. Ask Patricia. If anything is not done right he says to make him aware and discuss with me. I couldn’t find an example.”

18. Ms Powell said, “Is this when Patricia told you about the comments?” and Miss Lancaster replied, “I was only aware since the redundancy process started”.

19. We have referred back to our notes of the hearing and no member of the Tribunal could find any reference in their notes to Mr Palmer cross examining the claimant either on the contents of those parts of her witness statement or the notes of the grievance hearing.

20. For completeness we should record that this point does not appear to have been canvassed specifically in closing submissions so far as we can tell either.

21. Based upon that evidence from the claimant, effectively unchallenged by the respondent at the hearing, we conclude that having learnt of the comment of Mr Tumber, at a later point than it was made, the claimant was in fact shocked and upset at the comment. We find the cause was that upon reflection it appeared to her that it was the learning of her pregnancy, to which he had responded with the comment, that had led Mr Tumber, as she perceived it, to pick upon her and criticise her in the ensuing period.

22. Having regard to section 13 of the Equality Act 2010 we consider that the comment looked at in that way certainly engendered a detriment in that the claimant felt that she was placed at a disadvantage.

23. We consider then the provisions of section 26. We remind ourselves that we must take into account the perception of the claimant, the other circumstances of the case and whether it is reasonable for conduct to have effect in deciding whether the conduct complained of had the effect of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

24. We find that just as the unwanted conduct need not be received directly from the hands of the perpetrator so too the effect need not be contemporaneous with the conduct. Conduct that is not discovered until later, for whatever reason, may, at the point at which it is perceived have the effect of creating an intimidating or offensive environment in that it causes the person about whom the comment is made to look back at what has occurred in the intervening period and then have a perception that it is that comment which has, at least in part, created the intimidating or offensive environment.
25. Looked at in that way we consider that the comment did, in Miss Lancaster's perception, have that effect. Having regard to the other circumstances of the case, the other matters that we have found and which have not been subject to appeal, we confirm, with this additional reasoning, our earlier findings.
26. Thus, on the reconsideration we have been ordered to undertake, we confirm our earlier judgment. We do not understand it is suggested that we should revisit our remedy judgment in any event.

Employment Judge Ryan

Date 10 October 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE